

**Consumers Energy Company and Utility Workers  
Union of America, AFL-CIO, Petitioner. Case  
7-RC-22022**

July 5, 2002

**DECISION AND CERTIFICATION OF  
REPRESENTATIVE**

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held on August 15, 2001, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Election. The second revised tally of ballots shows 137 votes for and 136 against the Petitioner.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings<sup>1</sup> and recommendations, and finds that a certification of representative should be issued.

Contrary to our dissenting colleague, we agree with the hearing officer that the Board Agent properly denied Brian K. Vandenberg an opportunity to vote because he arrived after the scheduled 3 p.m. closing of the polls. See *Laidlaw Transit, Inc.*, 327 NLRB 315 (1999); *Monte Vista Disposal Co.*, 307 NLRB 531 (1992).

As fully set forth [as an appendix] is the attached portion of the hearing officer's report, the Board agent, the Employer's observer, and the Petitioner's observer all testified that the Board agent closed the polls at 3 p.m., according to his watch, and that Vandenberg arrived in the polling area shortly *after* this closing time. No one protested the Board agent's open reliance on his timepiece throughout the election, his closing of the polls at the announced time of 3 p.m., or his subsequent denial of a ballot to Vandenberg.

For the reasons set forth by the hearing officer, we agree that the Board agent's watch was the recognized official timepiece, even if he failed formally to designate it as such. In any event, Vandenberg's testimony that he "scanned in" at 2:59 p.m. at a clock located 30 feet from the closed door to the polling area does not prove that the Board Agent's watch was inaccurate. Nor does it prove that Vandenberg, who had two young children with him, must have gone from the clock's location to the polling area before that clock struck 3 p.m. Notably, Vandenberg did not protest to the Board agent that he had arrived before the proper closing time.

<sup>1</sup> We do not rely on the hearing officer's discussion of issues beyond the scope of our remand Order on February 20, 2002, which directed "a hearing solely to determine if Brian K. Vandenberg arrived at the polling place before the polls closed."

Further, even if we agreed with our dissenting colleague that the evidence is insufficient to show whether Vandenberg actually arrived late, we would adopt the hearing officer's recommendation to overrule the Employer's objection. It is the Employer's burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election. E.g., *Sahuaro Petroleum*, 306 NLRB 586, 586-587 (1992). If the evidence is insufficient, then the Employer has failed to meet its burden.<sup>2</sup> For the foregoing reasons, we agree with the hearing officer that the Employer has failed to prove that Vandenberg arrived at the polling place before the polls closed.<sup>3</sup>

**CERTIFICATION OF REPRESENTATIVE**

IT IS CERTIFIED that a majority of the valid ballots have been cast for Utility Workers Union of America, AFL-CIO, and that it is the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time customer service employees, including senior customer service representatives (CSRs), CSRs I, CSRs II, CSRs III, and home CSR agents, employed by the Employer at or out of its "virtual call center" facilities in Alma, Saginaw, Grand Rapids, Royal Oak, and Lansing, Michigan; but excluding all other nonexempt employees, all exempt employees, all operating, maintenance and construction employees, and guards and supervisors as defined in the Act.

MEMBER COWEN, dissenting.

Upon further review of this case, including the record on remand, I am convinced that the Regional Director correctly set aside the first election in this matter. Accordingly, I would grant the Employer's request for review, set aside the election, and remand this case to the Regional Director to conduct a second election.

This is a very close election in a relatively large unit. Following the systematic review and resolution of a number of challenged ballots, there is a one-vote margin of victory for the union, and one employee who was not allowed to vote because the Board agent had closed the polls before the employee had arrived to vote.

In the original request for review the Board considered the question of whether the election should be set aside based upon the possible disenfranchisement of this em-

<sup>2</sup> The closeness of the election does not alter this burden of proof.

<sup>3</sup> We do not rely on the hearing officer's discussion of issues beyond the scope of our remand directions in a February 20, 2002 Order granting the Union's request for review. We also find no need to address issues decided by that Order, which the Employer and the dissent have raised again here.

ployee because the Board agent conducting the election did not follow the appropriate procedure for handling Late-Arriving Employees. See NLRB Case Handling Manual, Part Two—Representation Proceedings, Sec. 11324.1. Because the record did not indicate whether the employee was, in fact, late in arriving at the polling place, the Board majority remanded this case to the Regional Director to conduct a hearing regarding this single issue.

Having conducted a hearing on the question of timeliness, we now know no more than we did before. Although the record clearly shows that the employee arrived at the polling place within seconds of the time that the Board agent closed the polls, the record does not establish whether the Board agent closed the polls at the scheduled time. In this regard, the election was scheduled to end at 3 p.m., and the record shows that the Board agent closed the polls when his personal watch indicated that it was 3 p.m. However, the record also shows that the employee in question “scanned-in” at 2:59 p.m. and walked 30 feet to the polling place only to be told that the election was over and that he could not cast a vote.

There is insufficient evidence in the record to establish that the Board agent’s personal watch reflected the correct time. This is due, at least in part, to another significant deviation from appropriate case handling procedures—the Board agent did not designate an official timepiece prior to the balloting. See NLRB Case Handling Manual, Part Two—Representation Proceedings, Sec. 11320. As a result, there was no synchronization of timepieces among the various parties, and there was no way to determine at the hearing whether the Board agent’s personal watch actually reflected the correct time.

Under all the circumstances in this case I can not agree with my colleagues that this close election should be certified when there is a significant possibility that a potentially determinative voter has been disenfranchised by the actions of the Board agent. Because of the lack of a designated official timepiece, we do not know whether the polls were closed early or whether the employee arrived late. Because the Board agent did not follow the proper challenged ballot procedure for handling a late-arriving employee, we do not know if the parties would have reached an agreement regarding this voter’s eligibility, thus resolving this matter prior to the opening and counting of the ballots.

Given the closeness of this election<sup>1</sup> and the very real potential that a determinative voter has been improperly

disenfranchised, I believe the better course is the one originally laid out by the Regional Director—conduct a new election immediately. As I see this case, we can either conduct a new election now, or risk being directed to do so by the U.S. Court of Appeals for the Sixth Circuit following a subsequent unfair labor practice proceeding. Simply stated, an early election is preferable to one directed several years from today.

## APPENDIX

### HEARING OFFICER’S REPORT

....

#### THE OBJECTION

*It is the Employer’s position that Brian K. Vandenberg, Senior Customer Service Representative, Grand Rapids Call Center employee whose name appears on the Excelsior list and who was precluded from casting a ballot even though he claims that he arrived prior to the vote closing time in the voting area, should be allowed to vote. According to Mr. Vandenberg, he arrived as the Board agent was closing the ballot box and when he asked if he could vote, the Board agent said no. Even if the Board agent had declared the poll to be closed, the ballot box had not been opened for counting. Under the Board’s manual, he should have been allowed to vote and, absent agreement between the Union and Employer, the Board agent should have challenged his ballot. Instead of following its own manual, the Board agent told Mr. Vandenberg that he could not vote.*

Although the Employer’s objection covers a number of issues, the Board’s Order is explicit in its direction that the hearing be held solely to determine if Brian K. Vandenberg arrived at the polling place before the polls closed.

The Employer presented three witnesses: the Board agent, their election observer Patricia Iciek, and Brian Vandenberg to testify directly to the issue at hand. The Petitioner called only their election observer, Marcella Koewers.

The Board agent testified that while he was giving the election observers their instructions, he did not recall informing them which watch or clock was going to be used for the purpose of determining the starting or stopping time for the election. He also testified to his actions at the close of the polls. “I remember walking out to the door and standing there and looking at my watch. It went immediately to 3:00 and my typical practice is to wait another 15 to 30 seconds to make sure nobody comes bolting in, is what I did in this situation. At that point, I told the observers, the polls are closed, which is my normal practice, as well, to make sure that everybody understands, including the observers that the polls are closed.” The Board agent also testified that he looked down the hall and did not see anyone coming and that he was using his watch as the official time. Further, he testified that he recalled it was two to

<sup>1</sup> The Board and the courts have consistently noted that election objections should be more carefully scrutinized in close elections. See, e.g., *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Copp’s Food*

*Center*, 296 NLRB 395 (1989); *NLRB v. VSA, Inc.*, 24 F.3d 588 (4th Cir. 1994); *St. Margaret Memorial Hospital v. NLRB*, 991 F.2d 1146 (3d Cir. 1993); *United Steel Workers of America v. NLRB*, 496 F.2d 1342 (5th Cir. 1974); accord: *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

four minutes after the close of the polls that Mr. Vandenberg arrived and that he told him that the polls were closed. Finally, the Board agent testified that it was his decision to close the polls and that neither Mr. Vandenberg nor the election observers protested or stated, at that time, that Mr. Vandenberg was present prior to the closing of the polls.

Ms. Iciek's testimony corroborates the Board agent with regard to the time the polls closed. She testified that during the last 10 minutes of the voting, there were no voters and that the Board agent was occasionally looking at his watch. She testified as follows: "He said it was 3:00; the voting process was done. I remember glancing down at my watch and it appeared to be 3:00 and, at that time, he asked—said it was completed, I could down the signs." Further, she testified that about 10 seconds after the polls closed Mr. Vandenberg arrived and the Board agent told him it was too late and that he [Mr. Vandenberg] walked away. Finally, she admitted that she did not ask the Board agent if Mr. Vandenberg could vote and she did not testify that she ever contested the Board agent's determination that it was 3:00 or that the polls were closed.

Mr. Vandenberg testified that it was his opinion that he was on time to vote and that he knew he was cutting it close. He also testified regarding his actions when he arrived at the polling place: "When I opened the auditorium door, she [the Employer's observer] was, maybe, a foot away. She was coming towards the door but she was right there. I mean, we kind of surprised each other when I opened it. She was standing right there. I asked something like, you know, am I too late to vote or I am here to vote. You know, is it too late and she just kind of looked at me like she did not know. We turned and proceeded to the table where the ballot box was (and the Board agent) was standing. He overheard me asking Patty if I could still vote and he responded, as I was approaching him that, no, it was past 3:00 and it was too late to vote." Further, Mr. Vandenberg testified that after he arrived at the polling place, he observed the Board agent's watch it and it appeared to be "slightly past 3:00." Finally, Mr. Vandenberg did not testify that he ever demanded to vote, or protested to the Board agent about not being allowed to vote, or that the Board agent's determination that it was 3:00 and that the polls were closed was in error.

Ms. Koewers testified on behalf of the Petitioner. Her testimony also corroborates the Board agent with regard to the time the polls closed. Her testimony regarding the closing of the polls is as follows: "Well, he looked at his watch. He had been looking at it for a few minutes, anyway, and it became three o'clock. He walked over by the door and he said, well, it is three o'clock. He said, I am going to give it another 30 seconds. He stood there. I kept track of my watch and I looked at the second hand, actually, and it was 30 seconds after and he said, the poll is closed." She also testified that 45 seconds to a minute later after the polls had closed Mr. Vandenberg arrived and was told by the Board agent that the polls were closed. She did not testify that she ever contested the Board agent's determination that it was 3:00 or that the polls were closed.

Also, both observers testified that when the polls opened, the Board agent said it was 2:00 and that the polls were open. Further, the observers each indicated that they looked at their own

watches when the polls were declared open and they testified that it either "appeared" to be 2:00 or it was 2:00.

#### Discussion

It is clear from the record before me that Mr. Vandenberg did not arrive at the polling place before the polls closed. All of the witnesses testified that Mr. Vandenberg arrived after the Board agent announced it was 3:00 and the polls had closed. Even Mr. Vandenberg testified that he observed the Board agent's watch and that it was "slightly past 3:00." Additionally, I find it telling that no one, including Mr. Vandenberg, protested the fact that he was denied a ballot *when the denial took place*. Only now does Mr. Vandenberg assert through his testimony that he holds the "opinion" that he was on time to vote. Neither his opinion nor the Employer's objection are supported by the evidence.

In its brief, the Employer raises a number of arguments including the failure to follow the Casehandling Manual, conflicting testimony of the witnesses and the testimony of Mr. Vandenberg concerning the time he arrived at the Employer's facility. As I will set forth below, the Employer's arguments are equally without merit.

The Board's Casehandling Manual, Part Two, Representation Proceedings (1999), has three sections that are applicable to the circumstances of the instant case. Section 11320, regarding the opening of the polls states in part, "The Board agent will select the official timepiece and so inform the observers." Also, Section 11324, regarding the closing of the polls states in part, "The polls should be declared closed exactly at the scheduled time determined by the Board agent as indicated by the timepiece selected prior to the opening of the polls." Finally, Section 11324.1, regarding late-arriving employees states:

An employee who arrives at the polling place after the designated polling period has ended is not entitled to have his or her ballot counted, absent extraordinary circumstances, unless the parties agree not to challenge the ballot. *Laidlaw Transit, Inc.*, 327 NLRB 315 (1999); *Monte Vista Disposal Co.*, 307 NLRB 531 (1992). In order to permit an orderly investigation if necessary after the election as to whether there were extraordinary circumstances, the following procedures should be followed when a voter arrives after the designated polling period has ended: the Board agent should determine whether there is agreement of all the parties as to whether such voter should be allowed to cast a ballot; if no such agreement is reached, the Board agent should permit the voter to cast a ballot, which the Board agent should then challenge.

In addressing the issue of failing to follow the Board's Casehandling Manual (CHM), it is well settled that the provisions of the CHM are not binding procedural rules rather they are merely intended to provide operational guidance. See *Avante at Boca Raton, Inc.*, 323 NLRB 555 (1997); *Queen Kapiolani Hotel*, 316 NLRB 655 (1995). Further, in order to set aside an election on the basis of a Board agent's conduct, the facts must raise a reasonable doubt as to the fairness and validity of the election and the Board agent's failure to follow the CHM will not warrant setting aside an election absent showing that the deviations from these guidelines raised reasonable doubt as to

the fairness and validity of the election. *Rheem Mfg. Co.*, 309 NLRB 459 (1992).

In the instant case, I find that the alleged failure to designate an official timepiece does not meet the burden to set aside an election based on the standards set forth in *Rheem Mfg. Co.*, supra. Clearly, the ultimate responsibility for the procedures used and the conduct of the election fall upon the Board agent that is present at the election. Under the Employer's theory, the failure to designate an official timepiece would relieve the Board agent[s] of their responsibilities to conduct the election by allowing for any other person's interpretation of what time it is and whether or not to close the polls. This argument is completely without merit, particularly in light of the facts of this case. Here, the Board agent opened the polls at 2:00 and closed them when the Board agent looked at his watch and declared it to be 3:00, both observers testified that they looked at their own watches and it either appeared to be 3:00 or it was 3:00 and no one objected to the closing of the polls. The failure of the Board agent to inform the parties that his watch was the "official timepiece" is irrelevant. The parties acquiesced to the Board agent's use of his watch and therefore, it became the de facto "official timepiece." I find the situation in the instant case to [be] similar to the facts in *Lemco Construction, Inc.*, 283 NLRB 459 (1987), where the Board held that employees who arrived to vote and found the polls to be closed, had failed to vote because "timepiece on which they relied differed from the official timepiece use in the election."

In examining the issue regarding how to handle a late arriving employee such as Mr. Vandenberg, the Employer seems to want to have it both ways. In its prior arguments, the Employer urges the Board to find that Mr. Vandenberg arrived after the polls closed. The relevant case law regarding late arriving employees set forth in *Laidlaw Transit* and *Monte Vista Disposal*, supra, where the Board established a bright-line test for late arriving employees. Applying the facts of the instant case to the bright-line test, I find that Mr. Vandenberg arrived at the polling place after the polls had closed; there is no agreement of the parties to allow him to vote; and there are no "extraordinary circumstances" present.<sup>3</sup> It is mere speculation to assume that

<sup>3</sup> Extraordinary circumstances shall include a showing that one of the parties was responsible for the tardiness of late-arriving voter or voters. See *Pruner Health Services*, 307 NLRB 529 (1992). However, the Board's Order in this case specifically instructed that I need not consider the reasons for Mr. Vandenberg's delay.

the parties would have agreed to permit him to vote. The issue of a challenged ballot would only apply if there was a need for an investigation into any alleged extraordinary circumstances. There are no extraordinary circumstances here. Therefore, having found that Mr. Vandenberg arrived at the polling place after the polls had closed and that there is no agreement between the parties to allow him to vote, I can make no other recommendation except that Mr. Vandenberg was properly denied a ballot.

With regard to conflicting testimony by the witnesses, I find that the only potential conflicting testimony is with regard to what happened *after* the polls had closed and Mr. Vandenberg arrived. I have already found that the witnesses credibly testified regarding the determination that it was the correct time to close the polls. The differing testimony regarding the amount of time after the polls closed that Mr. Vandenberg arrived is irrelevant and does not warrant an adverse credibility resolution.

Finally, the testimony of Mr. Vandenberg regarding his arrival at the Employer's facility prior to 3:00 is equally irrelevant as it continues to lead down the path that would relieve the Board agent[s] of their responsibility to conduct the election by allowing for someone else's interpretation of time to be controlling, particularly in light of the fact in this case, when there are no extraordinary circumstances present. The only thing that matters is what time the Board agent determined it to be and in this case, the Board agent's determination is supported by the testimony and evidence in the record before me.

#### CONCLUSIONS AND RECOMMENDATIONS TO THE BOARD

Based on my findings and conclusions above, I recommend that the Board overrule the Employer's objection in its entirety and that the appropriate certification of representative be issued.<sup>4</sup>

<sup>4</sup> Under the provisions of Sec. 102.69 of the Board's Rules and Regulation, Series 8, as amended, within 14 days from the issuance of this report, either party may file with the Board in Washington, D.C., an original and seven copies of exceptions thereto. Immediately upon filing of such exceptions the party filing same shall serve a copy thereof on the other parties and on me. If no exceptions are filed, the Board may adopt the recommendations of the Hearing Officer.